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MAR 18 2009
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SUPREME COURT, U.S.

No. 08-652

IN THE
SUPREME COURT OF THE UNITED STATES

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JEFFREY A. BEARD, et al.
Petitioners

v.

MUMIA ABU-JAMAL,
Respondent

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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# SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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## Reasons for granting the writ

### *Judge v. Beard* confirms the importance of the issues in this case.

This supplemental brief is filed pursuant to Rule 15.8, "calling attention to new cases." *Judge v. Beard*, Civil Action No. 02-CV-6798, is an opinion and order in the Eastern District of Pennsylvania granting federal habeas relief under *Mills* on the habeas petitioner's motion for summary judgment. While the decision is dated March 13, 2009, it was not entered until March 17, 2009, and was received by petitioner today, March 18, 2009.

The *Judge* court found the *Mills* claim materially indistinguishable from Third Circuit cases including *Abu-Jamal, Kindler v. Horn*, 542 F.3d 70, 83 (3d Cir. 2008) *cert. petition pending sub. nom. Beard v. Kindler*, and *Frey v. Fulcomer*. All those decisions follow the circuit court's decision in *Banks v. Horn* (which *Beard v. Banks* overruled without reaching the instant deference questions).

*Judge* confirms, contrary to respondent's argument (brief in opposition, 34-35), that the circuit court's view of *Mills* is an ongoing problem in federal habeas review of Pennsylvania capital cases.

Of greater interest is the *Judge* court's understanding of the circuit court's precedent. In

granting summary judgment for the habeas petitioner it relied on the above cases and concluded that the state court decision could not stand because "the importance of a unanimous finding was discussed within very close proximity to the mitigating circumstances clause," and because "there was no discussion or directive that the jury need *not* be unanimous[.]" *Judge*, 34-35 (original emphasis). *Compare* petitioner's reply brief at 5, 10-11 (explaining that "proximity" and "non-unanimity instruction" rationales have no basis in *Mills*, as many federal appellate courts have held).[1]

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[1] As in many cases in this circuit, the court in *Judge* also deemed a state procedural default rule "inadequate" because the state court had discretion not to apply it in every case. That same issue is presented in the Commonwealth's currently pending petition for certiorari in *Beard v. Kindler*, No. 08-992.

## Conclusion

For the reasons stet forth above, the Commonwealth respectfully requests this Court to grant its petition for writ of certiorari.

Respectfully submitted:

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